1987

The State of Utah v. Gregory R. Wight : Brief of Appellant

Utah Court of Appeals

David L. Wilkinson; attorney general; attorney for respondent.
Randall Gaither; attorney for appellant.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Case No. 870558-CA
	)	(Priority No. 2)
GREGORY R. WIGHT,	)	
	)	
Defendant-Appellant.	)	

BRIEF OF APPELLANT

Appeal from a conviction in the Second Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Douglas Cornaby, presiding.

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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLANT

JURISDICTION

This is an appeal from a final judgment in a criminal action filed within 30 days of the date of entry of the motion for new trial filed within ten days of sentencing of the defendant. Because the defendant was convicted of a third degree felony, automobile homicide, jurisdiction is conferred on this court pursuant to §78-2a-3, U.C.A. (1953, as amended).

NATURE OF PROCEEDINGS

This is a direct appeal in a criminal case from a sentence and commitment of appellant to the Utah State Prison after a finding of guilt to the lesser-included offense of automobile homicide, a third degree felony under §76-5-207(1)(a), U.C.A. (1953, as amended).

ISSUES PRESENTED ON APPEAL

1. The defendant was denied a fair trial and the conviction should be reversed because the Court did not enter

any findings in denying the motion to limit the prosecution from cross-examining the defendant as to his 1977 robbery conviction.

2. The Court erred in not declaring a mistrial when a juror indicated he knew the victim's family.

3. The Court erred in admitting expert testimony concerning accident reconstruction.

4. The Court should order a new trial on the grounds that the defendant's blood test was introduced into evidence without sufficient foundation and was not administered according to standard medical practice.

5. The defendant was denied effective assistance of counsel during the course of the trial as supported by the testimony introduced in the post-conviction matter of Gregory R. Wight v. Gerald Cook, filed in the Third Judicial District Court, Case No. C87-2157, in that his counsel did not effectively represent the defendant.

a. In failing to timely file an appeal.

b. In not being adequately prepared for trial as demonstrated by the transcript of the trial (T. 9).

c. In not objecting to the juror after the juror had stated that he knew the deceased victim's wife or explaining to the defendant the consequences of not making such an objection.

d. Not properly objecting to the chain of evidence concerning the blood tests.

e. Not examining the witnesses about an accident reconstruction by the experts employed by the State of Utah concerning plaintiff's exhibit no. 1 which was prepared prior to the accident reconstruction exhibit introduced at trial and which indicated that the collision may have taken place at a different location on the roadway which would have been exculpatory to the defendant.

f. In allowing the expert medical examiner to testify as to facts not in evidence (T. 267).

DETERMINATIVE CONSTITUTIONAL PROVISIONS

Article I, Section 12, states that, "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel ... ".

STATEMENT OF THE CASE

A. Nature of the Case.

The defendant-appellant was charged in an information with the offense of automobile homicide, a second degree felony, and was convicted of the lesser included offense of automobile homicide, a third degree felony, by jury trial.

B. Course of Proceeding.

After the jury found the defendant-appellant guilty, he was sentenced on July 8, 1986, to a third degree felony. A notice of appeal was not filed within thirty days.

The defendant-appellant petitioned the Third District Court in and for Salt Lake County in the case of Gregory Wight v. Gerald Cook, Civil No. C87-2157. On September 14, 1987,

after a hearing held on July 23, 1987, the Honorable Frank G. Noel entered an order that the defendant-appellant was entitled to be resentenced based upon a finding that Mr. Wight was denied his right to effective assistance of counsel for failure to file a notice of appeal. Judge Noel held that under State v. Johnson, 635 P.2d 36 (Utah, 1980), the defendant was entitled to be resentenced.

On October 6, 1987, the defendant-appellant was resentenced by the Honorable Douglas Cornaby of the Second Judicial District Court. The defendant-appellant filed a motion for new trial within ten days. The motion for new trial was denied in a ruling on November 20, 1987. The defendant then filed a notice of appeal.

C. Disposition at Trial Court.

The defendant was resentenced to the Utah State Prison for the conviction entered after the jury verdict effective as of July 8, 1986.

D. Relevant Facts.

On Thursday, June 12, 1986, and Friday, June 13, 1986, this case was presented to a jury in Farmington, Utah. Prior to trial the defendant-appellant's counsel made a motion to limit the State from introducing evidence of the defendant's prior felony conviction (T. 2).

The evidence proffered to the Court indicated the defendant was convicted of robbery on February 18, 1977, and subsequently paroled in 1980. The Court denied the motion prior

to commencement of the trial upon counsel's request to bring it first to the jury's attention during opening arguments in light of the Court's ruling (T. 6).

The first witness, Victor Pearce, testified he was driving northbound on Redwood Road on November 17, 1985, at 1 a.m. (T. 22). Just past the I-215 overpass a southbound car swerved into his lane (T. 24). He said the vehicle was traveling at 55 miles per hour (T. 26). After the car passed, it continued down the road and Mr. Pearce testified he saw a flash of light and noticed he could not see the taillights of the car that swerved into his lane (T. 26).

The witness indicated he turned his vehicle around and discovered there had been a head-on collision (T. 27). He stated that he observed a driver in each vehicle and one of the drivers Reid Nielson appeared to be dead. The witness said the roads were dry and there was no problem with visibility (T. 32). On cross-examination he stated that it took the paramedics four to five hours to extricate the defendant from behind the wheel of his vehicle (T. 44). He said he did not smell any alcohol on defendant's breath but did see some empty beer cans in defendant's vehicle (T. 51).

The next witness was David L. Barnes who was employed at Pacific Intermountain Express (P.I.E.) and was the supervisor of the deceased, Reid Neilsen. He testified that he saw Mr. Nielsen when he left the truck terminal at about 1:15 p.m. immediately before the accident (T. 63).

The next witness, Rick Millen, was an acquaintance of the defendant and was working with the defendant on the evening of Saturday, November 16, 1985 (T. 67). He testified that on the evening before the accident he was working with the defendant on the defendant's car (T. 68). They were working on vehicles together at the shop at their place of employment from about 10 a.m. on the 16th of November until 1:30 in the morning on the 17th of November (T. 70). He purchased a 12-pack of 12-ounce beer and the defendant bought a 12-pack of 12-ounce beer (T. 71). He said he could not recall how much beer the defendant consumed but said the defendant was very tired when he had left at 1:30 a.m. after having worked all day on the vehicle. He said that he came across the scene of the accident on his way home and told the officers the defendant had "probably just fell asleep" (T. 82). He also said that he told the officers that Mr. Wight was not drunk when he left the shop immediately before the collision.

A paramedic who responded to the scene of the accident testified that he inserted 1,000 "c.c.'s" of intravenous solution into the defendant's arm while he was trapped behind the wheel of his car before being extricated (T. 103). The paramedic testified on cross-examination that he did not perceive any smell of alcoholic beverage on the defendant's breath during the period of time he was attending the defendant at the accident scene or while he was being transported to the hospital (T. 107).

Utah Highway Patrol Trooper Steven R. Bytheway testified that he contacted the defendant after he had been transported to the emergency room at LDS Hospital in Salt Lake City, Utah (T. 135). He said he placed the defendant under arrest while the defendant was unconscious and directed the technician to draw blood from the defendant's arm (T. 146). The officer testified that he arrived on the scene at about 1:50 a.m. and the blood was drawn from the defendant's arm at 3:30 a.m. (T. 146).

Kathy Burns, the technician, testified that after drawing the blood, she took the packet home and kept the sample in her refrigerator (T. 152). On November 21, 1985, she took the sample to the State Laboratory for analysis.

Bruce Beck, an expert toxicologist for the State Health Laboratory, testified that the chemical analysis of the defendant's blood indicated a blood alcohol level of .20 percent weight to volume (T. 285). He testified that the exhibit which he analyzed, Exhibit No. 12, had writing on it stating "B.A. 5/2/85" and that "B.A." meant blood alcohol (T. 293). He could not explain the reason why the exhibit stated it was for blood alcohol taken in May, six months prior to the accident (T. 293). He further stated that it would be possible for a person to not have been above the legal limit when driving if the person consumed sufficient quantities of alcohol just prior to driving (T. 295). The blood was taken in this case over two hours after the driving (12:50 to 3:30) and was received without testimony

as to relation back to the time of driving or objection from defense counsel (T. 285).

The defendant took the stand and testified (T. 306). Mr. Wight stated that he worked at Companion Systems as a painter the week before the auto accident (T. 307). On Saturday, November 16, 1985, he went to his place of employment at 700 West Redwood Road, North Salt Lake, Utah (5. 311). He said he worked on personal vehicles at his business premises from about 12 noon on Saturday, November 16, 1985, with Rick Millen (T. 320). Mr. Wight testified in detail concerning his activity on the day before the accident and described his consumption of alcohol. He testified that he drank the majority of the beer that he consumed after midnight on the morning of November 17th and prior to leaving at approximately 1 a.m. (T. 336).

Mr. Wight testified that he was extremely tired while driving his car (T. 339). He recalled veering to the right and in relation to the accident stated as follows:

> A I don't know how far I was over the line. I don't remember ever being this far over and to the shoulder or near the shoulder of the road. What I remember when I initially just remembered and what I remembered afterwards, say, this is the truck here. This headlight here was hitting me right in the eyes, straight into the eyes, blinding me almost and I was several car lengths, at least, back from that and I couldn't figure out why, during that period of time, there was no movement going either direction because for some reason I guess I assumed that I was completely in my lane, but then when I realized this vehicle wasn't going to move to the side, I veered hard to my right and I believe I punched the accelerator totally to the floor.

> Q Why did you do that?
>
> A To gain some speed because it was coming up so fast or it seemed to be, but I don't remember ever being that far over and I was conscious, and if I had been way over here, this headlight wouldn't have been staring me straight in the eyes. That's how my recollection is and that's how I remember it as clearly as I can recall. Then that was the end of it. That's all I remember until just a little while later.

(T. 340).

SUMMARY OF ARGUMENT

1. A new trial should be granted because the appellant was denied a fair trial when the court denied the motion to limit evidence of his 1977 robbery conviction and he was required to answer to a felony conviction when he took the stand.

2. The court should grant a new trial based upon bias of a juror not disclosed on voir dire and discovered after the jury was impaneled.

3. Because the defendant was not lawfully arrested and no foundation existed for admission of the blood sample or results of testing of the sample, the blood sample, exhibit 12, should have been excluded from evidence.

4. The court erred in admitting the expert opinion concerning the speed of the defendant's vehicle.

5. The record of the trial and the post-conviction hearing held in Wight v. Cook supports a finding of ineffective assistance of counsel which requires a new trial.

ARGUMENT

I

A NEW TRIAL SHOULD BE GRANTED BECAUSE THE APPELLANT WAS DENIED A FAIR TRIAL WHEN THE COURT DENIED THE MOTION TO LIMIT EVIDENCE OF HIS 1977 ROBBERY CONVICTION AND HE WAS REQUIRED TO ANSWER TO A FELONY CONVICTION WHEN HE TOOK THE STAND.

The defendant filed a motion prior to trial to limit evidence of a prior conviction (T. 2). The Court heard argument prior to impaneling the jury that Mr. Wight was convicted of aggravated robbery in February 1977 and was paroled from the Utah State Prison in 1980 for that offense.

The issue involved is whether the prior offense involved "dishonesty or false statement" and whether the conviction could have been used by the prosecution to attack the victim's credibility. Rule 609(a), Utah Rules of Evidence.

The prosecution argued that the offense involved theft of the property of another and was therefore an offense obviously involving dishonesty. In the memorandum filed in the lower court, the State cited the case of State v. Clinton, 680 P.2d 33 (Utah, 1984). However, that case is distinguishable because it involves a prior conviction of theft, not robbery. Clinton was decided under Rule 21 of the Utah Rules of Evidence, not Rule 609 as invoked in this case before the Court.

The definition of aggravated robbery applicable in 1977 under §76-6-301, U.C.A., was as follows:

> Robbery is the unlawful and intentional taking of personal property of another from

> his person, or immediate presence, against his will, accomplished by means of force or fear, using a firearm or causing serious bodily injury. (Emphasis added.)

In the recent case of State v. Saniville, 64 Utah Adv.Rep. 17 (August, 1987), the Supreme Court indicated that the gravamen of the offense of robbery is the threat of physical force. The crime of robbery does not, by its nature, involve any dishonest statement and is based upon the use of force similar to an assault instead of the deception involved in a fraud or perjury.

In State v. Banner, 717 P.2d 1325 (Utah, 1986), the Supreme Court indicated that crimes such as rape do not inherently reflect on the defendant's character for truth and veracity. The Court recognized that any serious felony involves moral turpitude but did not equate lack of moral turpitude to inherent dishonesty.

The Utah Supreme Court has not ruled as to whether the offense of robbery constitutes a crime of "dishonesty." However, the federal cases interpreting Rule 609 of the Federal Rules of Evidence have not uniformly accepted all offenses involving robbery as automatically admissible under Subsection (2) of Rule 609. For example, in United States v. Glen, 667 F.2d 1269 (Cal., 1982), the Court said:

> Generally, crimes of violence, theft crimes, and crimes of stealth do not involve "dishonesty or false statement" and are thus not automatically admissible to impeach the credibility of a witness; although such crimes may indicate a lack of respect for

> the persons or property of others, they do not bear directly on the likelihood that the witness will testify truthfully; however, a conviction for burglary or theft may nevertheless be admissible under this rule if the crime was actually committed by fraudulent or deceitful means.

See also, United States v. Ortega, 561 F.2d 803 (Ariz., 1977), where the Court stated:

> Within subd. (a)(2) of this rule, "dishonesty or false statement" is limited to those crimes that involve some element of misrepresentation or other indicium of propensity to lie.

See Government of Virgin Islands v. Toto, 529 F.2d 278 (1st Cir., 1976).

In United States v. Smith, 551 F.2d 348 (1st Cir., 1976), the Court ruled attempted robbery was not a crime involving false statement within Rule 609(a)(2) and was not automatically admissible. See also, United States v. Seamster, 568 F.2d 188 (10th Cir., 1978) (burglary not automatically admissible); and United States v. Entrekin, 624 F.2d 597 (3rd Cir., 1980) (shoplifting not automatically admissible).

In this case the trial court did not clearly state whether its ruling allowing the conviction into evidence was based upon Rule 609(a)(1) or (2). Judge Cornaby stated, "I think one has the right to evaluate. . .his past as part of it. . . . It's within the period of time, so I am going to so rule." (T. 6).

The basis stated by the Court would not be a sufficient finding under Rule 609(a)(1) as stated by the recent Supreme

Court decisions in State v. Banner, supra, and State v. Gentry, 71 Utah Adv.Rep. 20 (12-1-87). In cases under 609(a) the Supreme Court has ruled that the Court must attempt to balance the prejudicial effect against the probative value and has identified the following factors:

1. The nature of the crime, as bearing on the character for veracity of the witness.

2. The recentness or remoteness of the prior conviction.

3. The similarity of the prior crime to the charged crime, insofar as a close resemblance may lead the jury to punish the accused as a bad person.

4. The importance of credibility issues in determining the truth in a prosecution tried without decisive nontestimonial evidence.

5. The importance of the accused's testimony, as perhaps warranting the exclusion of convictions probative of the accused's character for veracity.

The 1977 robbery conviction of the defendant is obviously remote and could only have caused the jury to punish the accused as a bad person, not to evaluate his credibility. There is a reasonable likelihood that the result would have been different if the Court excluded the defendant's prior conviction in that the issue of negligence and causation by consumption of alcohol were crucial issues resolved on he basis in part of the defendant's testimony.

The prosecution failed to present any evidence about the specific facts of the prior conviction in order that the Court could determine whether the offense involved false statement in the commission or was simply a violent crime. Standing alone, this conviction for robbery is simply a crime of violence which does not involve false statement or a propensity to lie and should not have been admitted at trial.

The error warrants several of the convictions for a new trial and on order that the conviction cannot be used on retrial.

II

THE COURT SHOULD GRANT A NEW TRIAL BASED UPON BIAS OF A JUROR NOT DISCLOSED ON VOIR DIRE AND DISCOVERED AFTER THE JURY WAS IMPANELED.

After the jury was impaneled and the prosecution made its opening statement to the jury, the record at page 15 reflects the following exchange:

> THE COURT: Mr. Walsh.
>
> MR. WALSH: Could we approach the bench for a second?
>
> THE COURT: Sure.
>
> (Whereupon, a discussion was held off the record between the Court and counsel.)
>
> THE COURT: Does anybody know the person who is deceased?
>
> JUROR LANE FAWCETT; Yes. I don't know him personally. I know his wife. I did not connect any of this prior to his statement up here, but I do know his wife, but I do not know him personally.

THE COURT: In what capacity?

JUROR LANE FAWCETT: Before they moved to Centerville, they lived about a block and a half from us.

THE COURT: Closely associated with them?

JUROR LANE FAWCETT: No. Just through the church.

THE COURT: Belonged to the same ward? Is that what you are saying?

JUROR LANE FAWCETT: Yes.

THE COURT: You understand what I said earlier about the obligation to be fair and impartial jurors. The fact that you know the deceased, would that have anything to do with that?

JUROR LANE FAWCETT: I don't know. It wouldn't.

THE COURT: You will be fair and impartial?

JUROR LANE FAWCETT: Absolutely.

THE COURT: Okay.

MR. WALSH: Your Honor, counsel, ladies and gentlemen of the jury.

(T. 16 and 17).

In the case of Gregory Wight v. Gerald Cook, Third District Court, Civil No. C87-2157, the Court ruled the defendant was denied effective assistance of counsel in relation to filing an appeal to the Utah Supreme Court. In that hearing, evidence was presented which bears on the issue of whether the defendant waived any objection to the juror in this case. A transcript of the hearing has been filed in relation to the hearing on the

motion for new trial with the court in this case. The evidence of the subsequent trial is relevant evidence in considering whether to grant a motion for new trial on the basis of this issue to determine whether the objection was waived by the defendant.

In that hearing the trial attorney for the defendant, John Walsh, testified as follows concerning this matter:

> MR. WALSH: I approached the bench first and inquired of the judge the fact that we had not asked the panel of jurors whether or not they knew the decedent. He then said, "Very well. Go ahead and take your seats and I will inquire." And then he proceeded to inquire of the jurors whether or not any of them knew the decedent.
>
> Q (By Mr. Gaither) Have you had a chance to review the transcript, sir?
>
> A No, I haven't.
>
> Q Show you the transcript of the trial..
>
> A It doesn't appear. I don't have an individual recollection that I approached him the second time. I may have just stated it from the bench.
>
> Q So any conversation you had with Mr. Wight would have been held at counsel table inside the courtroom?
>
> A Exactly.
>
> Q And you did not ask for a recess or any break to discuss this matter with Mr. Wight?
>
> A The judge gave us ultimate time. Whether I asked him or not, I don't recall. But the thrust is the judge gave me ample time to discuss it with my clients and we decided at that point in time--

Q And your testimony is that Mr. Wight was told that he could have an automatic mistrial if he would make an objection?

A That's correct.

Q And your testimony is that he waived the right to make that objection?

A He instructed me not to object.

Q All right. What was the words that he used when he said that, to the best of your recollection?

A He said, "I don't want to start over and so let's just proceed as if nothing had happened."

(Transcript in the case of Wight v. Cook, pages 48 to 50.)

Later, the defendant-appellant, Gregory R. Wight, testified in the habeas corpus matter as follows:

Q You have heard the testimony of Mr. Walsh concerning discussions that he had about the juror who was left on the trial jury panel today, is that correct, sir?

A (MR. WIGHT) Yes.

Q Did you ever instruct him not to object?

A To the juror?

Q Yes.

A No. My recollection is that there wasn't any long involved conversation or discussion. What it was like, we only have a very short period of time to decide in. And I pretty much tried to leave everything up to him in terms of the decision and throughout the course of the trial. I just felt like--mainly I tried to understand, you know, what transpired afterward. And I can't recall exactly what the conversations were or what my response was, or what is where. But it wasn't cut and tried as said.

Q How long were these conversations?

A They were very short.

Q And did you ever leave the courtroom or take any--

A No.

Q --recess?

A No. There was no recess.

Q And these were discussions in the courtroom?

A In the courtroom, yes.

Q And did he ever explain to you in detail what remedies you would have of the consequences of objecting to the juror?

A I think--well, see the thing was--I know he brought up the fact or something about the mistrial. But it wasn't clear to me. He--I was under the impression also possibly that jury could be replaced with another, you know, juror, with the remaining jurors still being allowed to be on the stand.

Now, that would have been unpleasant to me at this time. I didn't think that would have been a very good move to have something like that transpire. I didn't know what all could happen, you know. I didn't know what the options were. I did not have any clear understanding about what the actions were and it was-- The most effective thing would have been to have called for a recess and we could have gone out of the courtroom and discussed it in detail, so that I would have known, you know, what really was, you know, transpiring completely.

My wife is the one that said something to the effect of I don't know if I can handle going through this, you know, any longer, when he brought that up. I didn't say that.

> That was my wife, that said something to that effect.

(Transcript, Wight v. Cook, pages 61 to 63)

In State v. Jones, 52 Utah Adv.Rep. 39 (1987), the Supreme Court ruled that a trial court committed prejudicial error in refusing to excuse two jurors for cause. In that case one juror had associated with the victim's sister-in-law at work. The second juror knew the family of the victim and had attended the victim's funeral. The Court held that both jurors should have been dismissed from the panel and that the juror's later statements upon questioning by the judge could not obviate the strong inference of bias. The Court then reversed the conviction for a new trial.

If a motion for mistrial had been held in this case, the Court would have had to grant such a motion. Since no motion was made, the Court can still correct this error prior to appeal. In the cases of State v. Cobo, 69 P.2d 952 (Utah, 1936); State v. Schad, 470 P.2d 246 (Utah, 1970); and State v. Schoenfield, 545 P.2d 193 (Utah, 1976), the Supreme Court has held that errors can be noticed without objection if injustice has resulted.

In this case the Court should recognize the error without a finding of any waiver as a result of no objection. The Court has the benefit of the record of the recent writ of habeas corpus matter which reflects that the defendant did not

voluntarily waive the error and that according to the defendant, he was never fully explained the consequences.

In light of the case of State v. Jones, supra, the Court should correct the injustice which took place at trial and award a new trial before an impartial jury.

III

BECAUSE THE DEFENDANT WAS NOT LAWFULLY ARRESTED AND NO FOUNDATION EXISTED FOR ADMISSION OF THE BLOOD SAMPLE OR RESULTS OF TESTING OF THE SAMPLE, THE BLOOD SAMPLE, EXHIBIT 12, SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE.

The State's expert toxicologist, Bruce Beck of the Utah State Health Laboratory, testified he tested the blood found in State's Exhibit 12 that he received from Kathy Burns on November 21, 1985 (T. 281). He said he initialed the vial and performed an analysis on the same day he received the vial (T. 283).

Counsel for the defendant did not object to Exhibit 12 which was admitted into evidence. However, counsel for the defendant later asked the following questions about Exhibit 12:

> Q (By Mr. Walsh on cross-examination) Do you know what all the marks mean on Exhibit 12 as far as dates and so forth?
>
> A I can guess. I know what my own marks mean and other marks I can make assumptions about.
>
> Q Drawing your attention to the bottom of Exhibit 12, you have a "BA 5-2-85"; is that right?
>
> A That's what it says there.

> Q "BA" is a term used in the industry to determine blood alcohol content; is that not?
>
> A Yeah. Our abbreviation, to me, "BA" means blood alcohol.
>
> Q Do you have any knowledge of where a "BA for May of last year would have come on Exhibit 12?
>
> A No.

Later on redirect examination, the following question was posed by the prosecutor:

> Q (By Mr. Andrus) Referring to Exhibit 12, do you have any idea whether what Mr. Walsh referred to as "BA 5-2-85." Do you know if that refers to a date or not?
>
> A No, I don't.
>
> Q Do you know what it refers to?
>
> A No.

In addition, the evidence of the chain of custody of Exhibit 12 had shown that the person drawing the blood had kept the blood in her refrigerator at home in a locked container from November 17, 1985, until she took it to Mr. Bruce Beck on November 21, 1985 (T. 152). She further testified that because she had a lot of court cases, she didn't have time to get the tubes to the lab on Monday, but waited until Thursday (T. 155).

Furthermore, the errors concerning admissions are compounded because no objection was made that the evidence did not establish the blood was drawn within two hours of the driving. The technician testified that she drew the blood from Mr. Wight at 3:30 in the morning (T. 150). However, the

eyewitness, Victor M. Pearce, testified the accident was observed at about 1 a.m. or 12:45 a.m. (T. 23 and 33). Other times varied between 1 a.m. and 1:30 a.m. as the time of the accident.

Finally, no motion to suppress was made based on the seizure of the blood and the fact that the defendant was arrested while still unconscious at the hospital (T. 135). The officer testified that:

> A I waited for a few moments until the blood technician, Kathy Burns, arrived. Then she and I went into the emergency room together. The subject was unconscious at the time. I walked over to the subject. I could smell the odor of alcohol coming from his breath. I then formally placed him under arrest and then Kathy Burns drew the blood out of his arm.
>
> Q Was she under your direction?
>
> A Yes.

The "arrest" in this case did not comply with the Utah statutes which required the arrested person to be informed of the officer's cause and authority to arrest as required by §77-7-6, U.C.A. (1953, as amended). The "arrest" did not comply with the Utah law concerning arrest procedures as required by §77-7-1, et seq., U.C.A. (1953, as amended). Therefore, under the recent case of In the Interest of I.R.L., 61 Utah Adv.Rep. 48 (Utah Court of Appeals, 1987), his blood test was the result of an unconstitutional search and seizure. In that case the Court of Appeals held that the blood test must be taken after a lawful arrest to avoid suppression under the Fourth and Fourteenth Amendments.

In the case of In the interest of I.R.L., supra, the Court of Appeals noted that even though there was clearly probable cause to place the appellant under arrest, the person was not placed under arrest. The Court noted that the suspected driver was not informed of his rights and was not informed as to the consequences of refusal to submit to a blood test.

In the present case, all of the factors recognized in the above-cited case are present. In addition, the defendant could not have submitted because the officer testified that he was unconscious at the time of the "arrest".

In light of the foundational and constitutional error concerning the admission of the blood test, the appellant should be awarded a new trial.

IV

THE COURT ERRED IN ADMITTING THE EXPERT OPINION CONCERNING THE SPEED OF THE DEFENDANT'S VEHICLE.

The Court allowed two Utah Highway Patrol troopers, Shrol Erickson and Robert Dahle, to testify over objection as to their expert opinion as to the speed of the defendant's vehicle (T. 202). Prior to this expert conclusion, Officer Erickson testified that he only had the following experience as an expert:

> A In POST, which is Peace Officer's Standard of Training of Police Academy, I had approximately 80 hours of accident investigation, at which time, approximately a year after that I had another 40 hours of intermedial accident investigation and

last January I just completed advanced accident investigation, another 40 hours.

Q And that last course occurred after you investigated the accident that is the subject of this particular case?

A That is correct.

Q Have you investigated, during your period as a police officer, have you investigated traffic accidents?

A Yes, I have.

Q How many accidents have you investigated?

A I would say upward towards 75, ballpark figure.

(T. 173).

Later on voir dire, Officer Erickson stated in response to questions from defense counsel additional information concerning his experience:

Q (By Mr. Walsh) Isn't it correct, Officer, that you have never testified in court regarding critical speed scuff before this case?

A That's true.

Q And isn't it also true, Officer, that over the entire time that you worked for the police department, you only had ten such accidents as this?

A I don't recall. I don't keep exact count of specific types of accidents.

Q Do you recall the preliminary hearing took place when Judge Johnson asked you how many similar type cases as this you handled and you said ten at most, ten.

A Okay. I can go along with that.

Q Is that true?

A Sure.

Later he testified that in estimating the speed of the vehicles involved in this head-on collision, Officer Erickson relied upon charts from the Northwestern Institute. Upon questioning by the prosecutor, he stated:

> A Well, the traffic--or the Traffic Institute instigated by the Northwestern Institute, used the formula to come up with the format for it.
>
> Q Is that the way that you've been trained to determine critical speed scuffs from the formula?
>
> A Yes.
>
> THE COURT: Do you not use charts?
>
> THE WITNESS: I do use the charts. That specific night and the next day during my investigation, yes, I did use the charts.
>
> Q (By Mr. Andrus) So, you didn't work through the formula. You just took it from the charts.
>
> A I took it from the charts.

The Court then overruled the objection and allowed Officer Erickson to testify concerning the alleged speed of 71 miles per hour of the vehicle being driven by Mr. Wight.

Officer Dahle testified that he had 19 years of experience and had attended similar courses as Officer Erickson as well as other training (T. 246). Officer Dahle never visited the accident scene as did Officer Erickson and he never made the crucial measurements; and, based upon assumptions made by

Officer Erickson, he testified that the speed would have been 71 miles per hour (T. 249).

On cross-examination, he testified that Trooper Erickson in his original notes had used a figure of seven and one-half feet instead of seven and one-half inches (T. 252). Using that measurement, Officer Dahle testified the speed of defendant's car would have been 21 miles per hour.

In this case, Officer Erickson did not have sufficient expertise to determine speed by reconstruction of a collision where the vehicles collided head on. The Court erred in allowing the evidence to be received without sufficient foundation and based upon hearsay which was never introduced at trial. Bischoft v. Koenig, 100 N.W.2d 159 (North Dakota, 1960), 66 A.L.R.2d 1048 to 1075; and Ward v. Brown, 301 F.2d 445 (10th Cir., 1962). The reconstruction of speed from vehicles involved in a collision requires specified scientific and technical knowledge. Utah Rules of Evidence 702. The witness in this case did not have sufficient training and did not have sufficient experience.

The officer was also allowed to give his opinion as to the location of the point of impact between the vehicles. His opinion in this regard is subject to the same foundational problems. (See, for example, cross-examination at pages 235 and 242.) The officer indicated that the majority of the debris was found in the defendant's lane, fact inconsistent with his conclusions (T. 242). (Compare testimony of Trooper Slagowski

who testified that the mid-ordinant was about seven inches (T. 276).)

The Courts have been very cautious in requiring sufficient foundation and expertise in relation to critical evidence on speed by reconstruction.

In Clark v. Cotten, 573 SW.2d 886 (Tex.App., 1978), the trial court properly excluded the testimony of an officer investigating a head-on collision caused by a pick-up truck driving faster than conditions would permit. His testimony was excluded even though the trooper had been with the department of public safety for eight and one-half years, had received 17 weeks of training, and had investigated 350 accidents. The officer testified he saw "eraser marks" on the highway indicating defendant's westbound vehicle went into a skid or hydroplaned after hitting a puddle of water, went into the eastbound lane, and struck the plaintiff's vehicle; and the officer's training was that car could hydroplane at 56 mph when traveling through water. The investigating officer's opinion as to speed of defendant's automobile was properly excluded, where it would have been based, at least in part, on damage to the respective vehicles after the moment of impact. Further, there was an insufficient showing as to the witness' qualification to render such an opinion. See Baldwin v. Schipper, 393 F.2d 363 (Colo., 1968). An officers opinion has no probative value on speed, when based solely on damage resulting from a collision, absent skid marks, and showing of his qualifications as an expert to

determine speed, and his opinion is not admissible. See Reaves v. Brooks, 430 SW.2d 926 (Tex.Cir.App., 1971).

In Bailey v. Rhodes, 276 P.2d 713 (Ore. 1954), an action under the Oregon guest statute for injuries sustained when the automobile owned and operated by the defendant went off the road and plunged down an embankment, the court reversed a judgment for the plaintiff and ordered a new trial. The court held that prejudicial error was comitted in permitting a state police officer to give opinion testimony as to the speed of the defendant's automobile when his opinion was based on physical facts which he observed when investigating the accident. The court said that when the matter of speed is involved, the question primarily is not how fast the automobile was traveling in specific miles per hour, but whether its speed, whatever it may have been in miles per hour, was excessive under all the facts, circumstances, and conditions existing at the time. The court added that competent and qualified eyewitnesses who have observed a motor vehicle in motion may give their eyewitnesses who have observed a motor vehicle in motion may give their opinion as to the rate of speed it was traveling, but one not an eyewitness cannot express an opinion based solely upon physical facts existing after an accident, as to the rate of speed prior to the accident.

In Ransom v. Wersharr, 370 W.2d 598 (Ark., 1963), an action for injuries sustained by a pedestrian struck by the defendant's automobile, the court reversed a judgment for the

defendant on the grounds that it was error to admit the testimony of a police officer. The police officer testified as to the speed of the defendant's automobile when he had not witnessed the speed of the car or seen the scene of the accident or the skid marks, he had not inspected the brakes of the car, did not know the condition of the tread of the tires and did not know the extent to which the tires were inflated, did not know the number of passengers in the car as it affected the weight of the vehicle, and had conducted tests for skid factors at a place other than the scene of the accident, with a different car, on the morning of the trial. The court concluded that there were too many unknown factors which, according to the testimony of the witness himself, influenced the accident and the results should be considered by an expert before opinion testimony as to speed based on skid marks should be admitted.

In this case, there was not sufficient evidence of expertise or foundation to admit the critical evidence which is the primary basis for evidence of negligence.

V

THE RECORD OF THE TRIAL AND THE POST-CONVICTION HEARING HELD IN WIGHT V. COOK SUPPORTS A FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL WHICH REQUIRES A NEW TRIAL.

In State v. Malmrose, the Supreme Court stated:

> Defendant relies upon the U.S. v. Bosch, 584 F.2d 1113 (1st Cir., 1978), standard of "reasonably competent assistance of counsel". The Court in Dyer v. Crisp,

613 F.2d 275 (10th Cir., 1980), interpreted the standard to impose a four-part test to determine whether there has been "reasonably competent assistance of counsel." The test requires the defendant to (1) establish proof of the ineffectiveness of counsel, (2) show that the ineffectiveness was due to the inadequacy of counsel and not as a result of trial strategy, (3) demonstrate that better representation might have had some effect upon the result of the trial, and (4) prove that motions and objections which were not made would not have been futile if raised. The standard in Dyer has not been expressly adopted in Utah.

However, there are Utah cases which when read together parallel that standard. In State v. Gray, Utah 601 P.2d 918 (1979), we held that the accused has a right to effective counsel who does more than satisfy a pretense of representation. We stated that the defendant bears the burden of establishing ineffectiveness. The proof must be demonstrable, not speculative. In State v. McNichol, Utah, 554 P.2d 203, 205 (1976), we stated that the courts will not second guess "legitimate exercise of judgment as to trial tactics or strategy." Other Utah cases have held that there is no prejudicial error warranting reversal of the conviction unless better representation is likely to have produced a different result. State v. Gray, supra; State v. Forsyth, Utah, 560 P.2d 337 (1977); Jaramillo v. Turner, 24 Utah 2d 19, 465 P.2d 343 (1970); Allires v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969). In Heinlin v. Smith, Utah, 542 P.2d 1081 (1975), we held that the failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance. In order to show ineffective assistance of counsel in this case, therefore, defendant must show that the standards we have enumerated in previous cases were not satisfied.

In this case the defendant believes that his claim of ineffective assistance of counsel can be based upon objective points during the trial as set forth herein. The principal area of concern of the defendant is the lack of objections. In State v. Malmrose, the Court stated:

> Rule 4, Utah Rules of Evidence, requires a clear and definite objection to evidence at trial before appellate review can be requested. Stagmeyer v. Leatham Brothers, Inc., 20 Utah 2d 421, 439 P.2d 279 (1969); White v. Newman, 10 Utah 2d 62, 348 P.2d 343 (1960). The assignments of error where no objection was made at trial, therefore, are considered only to the extent that they may bear upon the claim of incompetence of counsel.

The defendant would cite to Point II of this brief in support of the failure to make an objection as one significant area of a lack of objection that supports a finding of ineffective assistance of counsel.

A second example is the evidence concerning the admission of the exhibits containing blood and results of testing on the blood as set forth in Point III of this brief. In addition, the record contains other information not objected to by counsel as set forth in the motion for new trial.

The defendant-appellant asks the court to review the other specific instances which he claims support his contention on appeal concerning effective assistance of counsel:

1. Page 9 of the transcript concerning the preparation for trial.

2. In allowing the expert medical examiner to testify as to facts not in evidence.

CONCLUSION

On the basis of the preceding points, the Court should reverse the conviction and order that a new trial not be afforded to the defendant-appellant.

Dated this 26 day of February, 1988.

RANDALL GAITHER
Attorney for Appellant

DELIVERY CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Brief of Appellant was hand delivered to the Utah Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on this _____ day of February, 1988.